FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 22 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

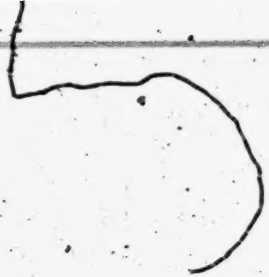
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

JOHN A. KELLY,
Counsel for Petitioner.

MILBANK, TWEED & HOPE and
JOHN A. KELLY,
Attorneys for Petitioner,

JOHN A. KELLY,
GEORGE F. KEENAN,
HENRY KIRK GREER,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,
Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The Circuit Court of Appeals for the Second Circuit has just handed down a decision in the case of *Callus, et al.* vs. *10 East 40th Street Building, Inc., et ano.*, in which it has again held that service employees in an office building

come within the purview of the Fair Labor Standards Act of 1938. Citing *Borella, et al.* v. *The Borden Company*, the Circuit Court of Appeals in the *Callus* case stated that "the executive offices of the manufacturing and mining concerns are occupied by those engaged in the production of goods for commerce." The court there went further and held also that sales agencies representing mining and manufacturing concerns were likewise engaged in the production of goods for commerce because they are "engaged in 'handling' the goods by arranging their transfer from one person to another."

The Circuit Court of Appeals for the Second Circuit, realizing that it has taken a unique position in controversies involving office building service employees and apparently desirous of dispelling any misunderstanding regarding that position, concluded its opinion in the *Callus* case with the following clear, unmistakable and decisive pronouncement:

> "Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here."

In this one sentence the Circuit Court of Appeals for the Second Circuit announced its awareness of the fact that the decisions in the *Borella* and *Callus* cases are in conflict with the decisions in other Circuits and that the reasoning which it followed in these two cases is in conflict with the reasoning adopted by other Circuit Courts of Appeals in the decision of like cases.

For the convenience of the Court we attach as an appendix to this brief the complete opinion of the Circuit Court of Appeals in the *Callus* case.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

JOHN A. KELLY,
Counsel for Petitioner.

MILBANK, TWEED & HOPE and
JOHN A. KELLY,
Attorneys for Petitioner,
15 Broad Street,
New York 5, N. Y.

JOHN A. KELLY,
GEORGE F. KEENAN,
HENRY KIRK GREER,
Of Counsel.

Appendix

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 143—OCTOBER TERM, 1944.

(Argued November 13, 1944 Decided December 12, 1944.)

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VESCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAI, JOSEPH HERRERA, EMIL J. CISEK and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Plaintiffs-Appellants,

—*v.*—

10 EAST 40th STREET BUILDING, INC., and CROSS & BROWN COMPANY,

Defendants-Appellees.

Before:

L. HAND, A. N. HAND and FRANK,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York dismissing appellants' complaint. Reversed.

AARON BENENSON (Monroe Goldwater and James L. Goldwater, of counsel) for appellants;

PROSKAUER ROSE GOETZ & MENDELSOHN (Joseph M. Proskauer, Harold H. Levin, of counsel) for appellee, 10 East 40th Street Building, Inc.

This is an action under §16(b) of the Fair Labor Standards Act (28 U. S. C. §216(b)) for the recovery by the plaintiffs, employees of defendant, of overtime wages and an equal amount in liquidated damages. The only question presented is whether the employees are covered by the Act. The plaintiffs are maintenance employees of an office building which is owned and operated by the defendant corporation. The building, during the time in question, was rented to the following groups of tenants:

(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.

(2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the companies they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.

(3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.

(4) The United States Employment Service which places white-collar workers in various factories and business houses.

(5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

(7) Investment, financing and credit organizations which use their offices for their executive and administrative

work. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character.

FRANK, *Circuit Judge:*

The plaintiffs' suit is based on the theory that they are "engaged in the production of goods for [interstate] commerce." They do not, and could not, contend that they are "engaged in [interstate] commerce." *McLeod* v. *Threlkeld*, 319 U. S. 491. It is already well-established that, where the tenants of a building are engaged in manufacturing, the service employees of the building come under the Fair Labor Standards Act, 29 U. S. C. sections 201 et seq. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. And we have recognized that persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act. *Borella* v. *Borden*, 145 F. (2d)——(C. C. A. 2). The question before us here then is whether a substantial proportion of the tenants of the office building at 10 East 40th Street are engaged in the production of goods for commerce.

1. It is clear, we think, that the investment, finance and credit organizations, the engineering and construction firms, as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not

engaged in the production of goods for commerce. These tenants occupy about 44% of the available space and 49% of the rented part of the building.

2. It would seem equally clear that the executive offices of the manufacturing and mining concerns are occupied by those engaged in the production of goods for commerce. *Borella* v. *Borden, supra.* These tenants occupy about 26% of the rentable area of the building and about 29% of the rented space. Thus, it may not be necessary to go beyond the activities of these tenants to determine that the maintenance employees are entitled to the benefits of the Act. The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. PR-19 (rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretations of the Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are "entitled to great weight." *United States* v. *American Trucking Associations*, 310 U. S. 534, 549. The Division's 20% standard seems to us a sensible one for the courts to adopt.

3. The publicity concerns which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce come within the definition of the Act. These firms occupy about 6.5% of the rentable area and about 7.5% of the rented area of the building. This, added to the space occupied by the management groups yields totals of 32.5% and 36.5% respectively.

4. For the purpose of the statute, the sales agencies representing mining and manufacturing concerns are engaged in the production of goods for commerce. The Act covers "goods" until "their delivery into the actual physi-

cal possession of the ultimate consumer." Section 3(i) [29 U. S. C. A. §203(i)]. And "production" is defined to include "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." Section 3(j) [29 U. S. C. A. §203 (j)]. Thus, transportation of goods until their delivery to the ultimate consumer is "production" as defined by the statute. A sales agent who procures the contracts in performance of which the goods are "transported" is therefore engaged in the production of goods for commerce, since he is "necessary" to the "transporting." It may be contended that such a construction would bring all retailers within the Act and that Congress had no such intention. §13(a) (2) of the Act [29 U. S. C. A. §213(a) (2)], however, specifically excludes employees "engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." This would indicate that where the "selling or servicing is in [interstate] commerce" the employees are to be included in the scope of the Act.

Moreover, sales agents may be considered as engaged in "handling" the goods by arranging their transfer from one person to another. That no physical contact with the goods is necessary we pointed out in the *Borella* case. Cf. *Kirschbaum Co.* v. *Walling, supra.* And §13(a) (5) [29 U. S. C. A. §213(a) (5)] specifically excludes employees engaged in "marketing" and "distributing" of certain designated products. By implication, marketing and distributing of other products would seem to be included within the Act.

Furthermore, the activity of the sales agents is economically necessary to the production of goods. As Mr. Justice Jackson recently pointed out, the word "necessary" in the statute is not to be construed so rigidly as to include within the Act only those essential to the actual manufacture of the goods. *Armour and Co.* v. *Wantock,* —— U. S. —— (Dec. 4, 1944).

These sales agencies represent occupancy of about 9.5% of the available area and 10.5% of the rented area. Adding the space they occupy to that occupied by executive offices and publicity concerns yields the result that the portion of the building occupied by firms engaged in the production of goods for interstate commerce is 42% of the rentable area and 48% of the rented area.

Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here.

Reversed.